

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

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|----------------------------------|---|--------------------|
| LARRY COFFMAN |) | |
| Claimant |) | |
| VS |) | |
| |) | Docket No. 205,062 |
| STATE OF KANSAS |) | |
| Respondent |) | |
| |) | |
| and |) | |
| |) | |
| STATE SELF-INSURANCE FUND |) | |
| Insurance Carrier |) | |

ORDER

Claimant appeals from an Award on Review and Modification entered by Administrative Law Judge Bryce D. Benedict on October 3, 2001. The Appeals Board heard oral argument on April 16, 2002.

Appearances

Claimant appeared by his attorney, Roger D. Fincher of Topeka, Kansas. Respondent and its insurance fund appeared by their attorney, Scott M. Gates of Topeka, Kansas.

Record and Stipulations

The Appeals Board (Board) has considered the record and adopts the stipulations listed in the Award and the Award on Review and Modification.

Issues

Claimant injured his back on June 14, 1994, when a chair in which the claimant was sitting broke. Claimant injured his left knee on May 20, 1995, during a functional capacities examination being conducted in connection with this workers compensation claim. On April 10, 1998, Judge Benedict awarded claimant an 81percent permanent partial general body disability based on a 62 percent task loss and a 100 percent wage loss. Thereafter, on October 3, 2001, Judge Benedict denied claimant's request to modify the April 10, 1998, Award. Claimant seeks review of that decision, contending the original Award was inadequate and/or that there has been a change of circumstances such that claimant is now permanently and totally disabled.

Findings of Fact and Conclusions of Law

After reviewing the record and considering the arguments, the Board concludes the Award by the Administrative Law Judge (ALJ) should be reversed. Claimant has shown a change of circumstances to support modification of the original Award and has further proven that the original Award was inadequate.¹

Claimant's original Award was for a work disability, a permanent partial disability greater than the claimant's percentage of functional impairment. Claimant contends he is now permanently and totally disabled as a result of his work related injuries and, therefore, his Award should be modified to a permanent total disability Award. Respondent and its insurance fund (respondent) now argues that claimant was permanently and totally disabled at the time of the original award and remains permanently and totally disabled today. Therefore, there has been no change of circumstances and can be no modification of the Award. Respondent presents this review and modification proceeding as an attempt by claimant to re-litigate the original claim.

Throughout the trial of the original claim, respondent denied claimant was permanently and totally disabled. To now admit that claimant has been permanently and totally disabled all along, where respondent is unwilling to voluntarily agree to a modification of the original award to a permanent total disability award and where respondent has changed tack solely to defeat claimant's request for modification to an award based upon his now acknowledged permanent and total disability, is disingenuous. Under these circumstances respondent should be estopped from taking a position on review and modification that is contrary to its position at the time of the original award.²

¹ K.S.A. 44-528.

² *Marley v. M. Bruenger & Co., Inc.*, 27 Kan. App. 2d 501, 6 P.3d 421 (2000).

The Board finds that claimant's disability has changed from a work disability to a permanent total disability.

Respondent further argues that the Kansas Workers' Compensation Act as interpreted by case law requires that it is not enough for claimant to show that his disability has changed from a work disability to a permanent total disability. Claimant must show that either his condition has changed, or that his employment status has changed in order for there to be a modification of the original award. Respondent contends that this requires a showing of either a change in the percentage of functional impairment, a change in restrictions or a change in claimant's employment status. And, as Dr. Jones testified that he would not change his earlier testimony as to claimant's percentage of functional impairment and restrictions, and as claimant's employment status has not changed (he remains unemployed), there can be no modification of the original award.

Claimant concedes that the record shows no change in functional impairment, restrictions or employment status, but argues his condition has nevertheless worsened. The Board agrees. Although, oddly, claimant did not testify at the hearing on his Application for Review and Modification, claimant described to his physician, Dr. Jones, his increased symptomology, including a worsening of his back and knee pain. Dr. Jones' acknowledged these symptoms show a worsening of claimant's condition and further acknowledged that a comparison of x-rays revealed a progression of his degenerative arthritis. The Kansas Supreme Court has said that even the effects of age on a work related injury constitute a change of circumstances which will warrant review and modification of an award.³

Finally, claimant argues that the Review and Modification Statute K.S.A. 44-528 does not mandate a change of circumstances or condition. Rather, all that is required is a showing that the original award was inadequate. The pertinent portion of that statute provides:

. . . [I]f the administrative law judge finds . . . , that the award is excessive or inadequate **or** that the functional impairment or work disability of the employee has increased or diminished, the administrative judge may modify such award, or reinstate a prior award, upon such terms as may be just, by increasing or diminishing the compensation subject to the limitations provided in the workers' compensation act. (emphasis added)

Claimant points to the disjunctive wording of the statute where it provides that the ALJ need only find the award is excessive or inadequate "or" that the functional impairment

³ *Nance v. Harvey County*, 263 Kan. 542, 952 P.2d 411 (1997).

or work disability of the employee has increased or diminished in order to justify a modification of the award. Under this interpretation, claimant need only show that the original award was inadequate. Thus, respondent's admission that claimant is now permanently and totally disabled satisfies claimant's burden in this regard. In addition, respondent's new assertion that claimant was permanently and totally disabled at the time of the original Award would likewise satisfy his burden of proving the original Award was inadequate. Respondent counters that such is not the law and that public policy considerations favoring finality of judgments preclude such an interpretation of K.S.A. 44-528 as it would open all awards to re-litigating the original findings and conclusions.

Although the law favors the finality of judgments, the policy considerations in favor of finality of judgments are less compelling in workers compensation proceedings than in civil proceedings brought in district court.⁴ This is evidenced by the fact that neither K.S.A. 44-528 nor K.A.R. 51-19-1 set any specific limit on the number of applications for review and modification of an award that may be filed, nor do they limit the time following the entry of an award within which an application for review and modification must be filed.⁵ Furthermore, although some workers compensation benefits are of limited duration, such as the 415 weeks in the case of permanent partial disability compensation; others are not limited by duration but instead only by amount, such as temporary total disability compensation and permanent total disability compensation. Still other benefits, such as future medical treatment, are not limited by either time or amount.

The Board agrees with claimant's assertion concerning the plain language of the statute. However, the Board also agrees with respondent's contention that the interpretation argued by claimant is not the interpretation given to K.S.A. 44-528 by the Kansas appellate courts. Rather, our appellate courts have consistently held that there must be a change of circumstances, either in claimant's physical or employment status, to justify modification of an award.⁶

Review and modification under K.S.A. 44-528 is not intended as a means of retrying the case to challenge the original findings or award. Absent a showing the award was obtained by fraud or undue influence, or that the award was made without authority or as a result of serious misconduct, there must be some change in circumstances from the time

⁴ See, *Ferrell v. Day & Zimmerman, Inc.*, 223 Kan. 421, 573 P.2d 1065 (1978).

⁵ The regulation, however, does limit how often applications for review and modification may be filed. K.A.R. 51-19-1(c) and K.S.A. 44-528(c).

⁶ See, e.g., *Gile v. Associated Co.*, 223 Kan. 739, 576 P.2d 663 (1978); *Coffee v. Fleming Company, Inc.*, 199 Kan. 453, 430 P.2d 259 (1967); *Redgate v. City of Wichita*, 17 Kan. App. 2d 253, 836 P.2d 1205 (1992).

of the original award before review and modification is appropriate. Nevertheless, the Board finds that the record in this case contains sufficient evidence of the change in claimant's condition as to award modification of the original work disability award to a permanent total disability award. That change was apparent at least by claimant's December 7, 1999 examination by Dr. Jones. However, as the statute limits modification to no more than six months prior to the date the Application for Review and Modification was made, this modification will be effective October 30, 2000, which is six months before April 30, 2001, the date claimant's form K-WC E-5 Application for Review and Modification was filed.

Award

WHEREFORE, it is the finding, decision and order of the Appeals Board that the Award on Review and Modification entered by Administrative Law Judge Bryce D. Benedict dated October 3, 2001, should be, and the same is hereby, reversed, and an Award modifying the April 10, 1998 Award is entered as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Larry Coffman who is granted compensation from the State of Kansas and the State Self-Insurance Fund for a June 14, 1994 accident and resulting disability. Based upon an average weekly wage of \$655.15, for the period from June 15, 1994, through July 28, 2000, Mr. Coffman is entitled to receive 319.49 weeks of permanent partial disability benefits at \$313 per week, or a sum not to exceed \$100,000, for an 81 percent permanent partial general disability.

For the period commencing October 30, 2000, Mr. Coffman is entitled to receive 79.87 weeks of permanent partial disability benefits at \$313 per week, or a sum not to exceed \$25,000, for a total award not to exceed \$125,000.

As of April 25, 2002, there would be due and owing to Mr. Coffman 397.06 weeks of permanent partial general disability compensation at \$313 per week, or \$124,279.78, which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance of \$720.22 shall be paid at \$313 per week until fully paid or until further order of the Director.

The remaining orders of the Administrative Law Judge are adopted to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this _____ day of April 2002

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Roger D. Fincher, Attorney for Claimant
 Scott M. Gates, Attorney for Claimant
 Bryce D. Benedict, Administrative Law Judge
 Philip S. Harness, Workers Compensation Director